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NO. _____

In The

Supreme Court of United States

October Term, 2008

JOHN JERRY FIORILLO

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the requirement of proof beyond a reasonable doubt as announced in *Blakely* as extended to *Booker* a watershed rule of constitutional procedure that should be applied retroactively under the *Teague* Rule On Retroactivity?

2. Should the retroactivity principle in *Teague v Lane*, 489 U.S. 288 (1989) bar relief where the very issue being contested in light of new constitutional law was duly raised on appeal in the circuit court?

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Order Granting Request for Certificate of Appealability in Part entered November 20, 2006

Memorandum Opinion and Order Denying Motion for Summary Judgment and Denying Petition for Writ of Habeas Corpus, October 2, 2006

United States v. Hermanek, 47 Fed.Appx. 439 (9th Cir. 2002) (not reported)

The decisions below of the Ninth Circuit and of the United States District Court for the Northern District of California were not reported. The decisions are included in the Appendix.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Ninth Circuit of which petitioner John Jerry Fiorillo seeks review was entered November 13, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense,

28 U.S.C. §2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

Following a four month jury trial, Petitioner was convicted of one count of conspiracy to distribute cocaine, six counts of possession with intent to distribute cocaine and one count of use of a counterfeit access device (cell phone) with intent to defraud.

Following the trial, the defendants moved for a mistrial on the grounds of juror misconduct. On June 27, 1997, the district court granted the defendants' motion and declared a mistrial. The Government appealed and on May 14, 1998, the Ninth Circuit reversed and remanded. *United States v. Flowers*, 145 F.3d 1342 (9th Cir. ,1998).

Petitioner renewed his motion for a new trial which was denied by the Court on December 16, 1998. On February 16, 1999, the district court found that Appellant was guilty of the distribution of 58 kilos of

cocaine and sentenced him to the bottom of the guideline range to 360 months imprisonment.

Both Petitioner and his co-defendant, Anthony Flowers challenged their sentences under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct.. 2348 (2000) because the drug quantity associated with their offenses was not submitted to the jury and found beyond a reasonable doubt (*Hermanak*, 47 Fed.Appx. at 445-446). On appeal, Fiorillo argued that the stacking provisions of U.S.S.G.§5G1.2(d) should not be used as an end-run around *Apprendi* - that is, that the drug quantity must be submitted to a jury and found beyond a reasonable doubt.

The Ninth Court applied its analysis in *United States v. Buckland*, 277 F.3d 1173 (9th Cir. 2002) to both Fiorillo's and Flowers' *Apprendi* challenges. Distinguishing this case from *Buckland* (where the defendant conceded the drug quantities on the record), the Court of Appeals explicitly rejected the government's argument that no reasonable jury could have found beyond a reasonable doubt the Fiorillo's offenses did not involve at least 500 grams of cocaine (*Id* at 446-447). However, the Court rejected Fiorillo's claim that the "stacking provisions"of U.S.S.G.§5G1.2(d) could not be used to cure the failure to submit the drug quantities to the jury and affirmed his 360 months sentence.

In contrast, the Court vacated Flowers' conviction and remanded for resentencing. The Court applied exactly the same analysis but relying on its decision in *United States v. Archdale*, 229 F.3d 861, 870 (9th Cir.

2000) held that Flowers' 336 month sentence exceeded the allowable total minimum punishment by 12 months. Accordingly, Flowers was remanded for resentencing. On February 24, 2003, this Court denied Appellant's petition for a writ of certiorari at which point his conviction became final.

On February 24, 2004, Petitioner filed a Motion to Correct his Sentence under 28 U.S.C. § 2255.

Following this Court's decision in *Blakely v. Washington,* 542 U.S. 296 (2004), on November 3, 2004, Petitioner filed a motion to amend his §2255 motion to include the relitigation of his *Apprendi* claim in light of the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 decided on June 24, 2004 on the ground that his sentence violated his Sixth Amendment right to trial by jury because neither the drug quantity associated with his offense nor the four level enhancement imposed for his role in the offense and for possession of a firearm were submitted to the jury and found beyond a reasonable doubt and because the sentencing court believed that it was bound by the sentencing guidelines.

Fiorillo's argument that his *Apprendi/Blakely* claim related back to his original timely filed §2255 motion in accordance with the Ninth Circuit decision in *Felix v. Mayle,*379 F.3d 612 (9th Cir.2004) was unopposed by the Government. On May 3, 2005, the district court granted Fiorillo's motion for leave to amend his petition. On October 2, 2006, the Court dismissed the Petition on the grounds that *Blakely / Booker* was not retroactive and thus relief was barred under §2255.

On October 10, 2007 Appellant filed a notice of appeal and a request for a certificate of appealability . On November 20, 2006, the district court, denied a certificate of appealability as to Petitioner's sentencing claims on the grounds that his claims were time barred as result of this Court's decision in *Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562 (2005) decided during the pendency of the amended petition and that in any event neither *Blakely* nor *Booker* are retroactive and thus do not apply to cases on collateral review.

On January 6, 2007, Fiorillo moved to expand the certificate of appealability to include his sentencing claims and sought recall of the mandate in light of his court's decision in *Carrington v. United States*, 470 F.3d 920 (9th Cir. 2006). Appellant's request was denied on February 16, 2006.

The decision of the district court was affirmed on appeal on November 13, 2007.

REASONS FOR GRANTING THE PETITION

This petition presents an opportunity for the Court to settle two questions of significant import for the many thousands of federal defendants who remain incarcerated under prison terms imposed to punish conduct never proved beyond a reasonable doubt. *See* Sup. Ct. R. 10(c).

The first question on which Petitioner seeks review is essentially the one on which this Court granted

certiorari in *Burton v. Stewart,* 127 S.Ct. 793 (2007) but did not reach for jurisdictional reasons: whether, *Blakely as extended to Booker*, like other decisions extending the requirement that criminal culpability be proved beyond a reasonable doubt, announced a watershed rule of criminal procedure.

The second question is whether *Teague* should apply where the very issue being contested in light of new constitutional law was duly raised on appeal.

I

BLAKELY/BOOKER ANNOUNCED A 'WATERSHED' RULE OF CRIMINAL PROCEDURE WITHIN THE MEANING OF *TEAGUE*

This Court has held that under the doctrine set forth in *Teague v. Lane,* 489 U.S. 288 (1989), new procedural rules do not apply retroactively unless they fall into one of two exceptions. *See Beard v. Banks,* 542 U.S. 406, 411 (2004).

In *Burton v. Stewart*, 127 S.Ct. 793, 794 (2007), this Court granted *certiorari* to consider the retroactivity of the rule announced in *Blakely v. Washington.* In *Burton*, the petitioner focused, as here, on the requirement of proof beyond a reasonable doubt rather than the freestanding requirement that facts essential to sentence be found by a jury. For jurisdictional reasons, however, the Court was unable to reach the question on which it granted *certiorari. Burton,* 127 S. Ct. at 796. The within petition now presents an opportunity to

decide it.

Fiorillo's §2255 amended petition asserting *Blakely/Booker* error well within one year of the *Blakely* decision, but was deemed out of time under Ninth Circuit precedent holding that this Court's decision in *United States v. Booker,* 543 U.S. 220 (2005) rendering the sentencing guidelines advisory is not to be given retroactive effect. In this posture, the case permits the Court to review the recurring question of whether *Teague* controls the construction of the phrase "made retroactively applicable to cases on collateral review" in §2255 para. 6(3) or otherwise limits the availability of relief on motions under the statute.

Should Fiorillo's motion be held timely, the matter should be remanded for the district court to determine whether his sentence was, as asserted, infected by *Booker* error and, if so, whether and how to remedy that infirmity.

A. The Failure to Find Sentencing Facts By Proof Beyond A Reasonable Doubt Substantially Diminishes Accuracy and Neglects a Bedrock Element of Fairness

A watershed rule is one that "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins,* 506 U.S. 461, 478 (1993). To qualify, a rule must meet two requirements: its infringement must "seriously diminish the likelihood of obtaining an accurate conviction," and the rule must

"alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain,* 533 U.S. 656, 665 (2001). *Booker*'s extension of the requirement of proof beyond a reasonable doubt to federal sentencing proceedings should be held to meet this definition.

The Court has previously directed that the requirement of proof beyond a reasonable doubt is so essential to the right of fair trial as to require "complete retroactive effect." *Hankerson v. North Carolina,* 432 U.S. 233, 243 (1977); *see also United States v. Johnson,* 457 U.S. 537, 544 (1982). Failure to uphold the reasonable doubt standard "substantially impairs [the criminal trial's] truth-finding function and so raises serious questions about the accuracy of guilty verdicts." *Hankerson,* 432 U.S. at 243. As a "prime instrument for reducing the risk of ... factual error," the requirement of proof beyond a reasonable doubt is "indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *In re Winship,* 397 U.S. 358, 363-64 (1970).

Even more fundamentally, the reasonable doubt standard "provides concrete substance for the presumption of innocence - that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *Winship,* 397 U.S. at 363 (quoting *Coffin v. United States,* 156 U.S. 432, 453 (1895)).

The dual functions served by the standard make clear that its application in federal sentencing proceedings

necessarily implicates both "accuracy" and "fundamental fairness" within the meaning of the watershed rule exception. As the standard is a "prime instrument for reducing the risk of ... factual error" and, conversely, as the rule's neglect "substantially impairs" the truth-finding function, it is clear that the requirement of proof beyond a reasonable doubt satisfies the first element of the definition of a "watershed" rule, namely, that its infringement "seriously diminish[es] the likelihood" of an accurate determination of culpability.

Moreover, the application of a "bedrock axiomatic and elementary principle," *Winship,* 397 U.S. at 363, satisfies the second "watershed" element, requiring that the new rule "alter our understanding of the bedrock procedural elements" of a fair federal sentencing hearing. *Booker* 's essential contribution to fundamental fairness has found expression in the exercise of discretion by numerous courts of appeals to correct unpreserved *Booker* error that "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Oliver,* 397 F.3d 369, 378 (6th Cir. 2005); *see also United States v. Antonakopoulos,* 399 F.3d 68, 81-82 (1st Cir. 2005); *United States v. Crosby,* 397 F.3d 103, 119 (2d Cir. 2005) (Newman, J.); *United States v. Hughes,* 396 F.3d 375, 381 n.8 (4th Cir. 2005) (Wilkins, C.J.); *United States v. Paladino,* 401 F.3d 471, 483 (7th Cir. 2005) (Posner, J.), *cert. denied*, 546 U.S. 1175 (2006); *United States v. Ameline,* 409 F.3d 1073, 1079, 1081 (9th Cir. 2005) (en banc); United States v. Coles, 403 F.3d 764, 767 (D.C. Cir. 2005) (per curiam).

Consonant with the reasonable doubt standard's watershed quality, this Court and the circuits have repeatedly held, as in *Hankerson*, that new rules giving effect to the standard must be applied retroactively after the conclusion of direct appeal. *Ivan V. v. City of New York,* 407 U.S. 203, 205 (1972); *United States v. Montalvo,* 331 F.3d 1052, 1055-56 (9th Cir. 2003) (considering rule announced in *Richardson v. United States,* 526 U.S. 813 (1999)); *Ross v. United States,* 289 F.3d 677, 681 (11th Cir. 2002) (same); *Santana-Madera v. United States,* 260 F.3d 133, 139 (2d Cir. 2001) (same); *United States v. Lopez,* 248 F.3d 427, 432 (5th Cir. 2001) (same); *Murr v. United States,* 200 F.3d 895, 906 (6th Cir. 2000) (same); *Lanier v. United States,* 220 F.3d 833, 838 (7th Cir. 2000) (same); *Gaines v. Kelly,* 202 F.3d 598, 605 (2d Cir. 2000) (considering rule announced in *Cage v. Louisiana,* 498 U.S. 39 (1990)); *West v. Vaughn,* 204 F.3d 53, 61-63 (3d Cir. 2000) (same), *overruled on other ground, Tyler v. Cain,* 533 U.S. 656, 661-62 (2001); *Tillman v. Cook,* 215 F.3d 1116, 1122 (10th Cir. 2000) (considering rule of *Cage*); *Humphrey v. Cain,* 138 F.3d 552, 553 (5th Cir. 1998) (en banc) (same); *Adams v. Aiken,* 41 F.3d 175, 178-79 (4th Cir. 1994) (same); *Nutter v. White,* 39 F.3d 1154, 1157-58 (11th Cir. 1994) (same); *Hall v. Kelso,* 892 F.2d 1541, 1543 n.1 (11th Cir. 1990) (considering rule announced in *Sandstrom v. Montana,* 442 U.S. 510 (1979), and *Francis v. Franklin,* 471 U.S. 307 (1985)).

This Court has also held that a failure to give proper effect to the reasonable doubt standard is "structural error" necessarily invalidating any conviction. *See Sullivan v. Louisiana,* 508 U.S. 275, 280-82 (1993). Because the definition of structural error, *see Arizona v.*

Fulminante, 499 U.S. 279, 310 (1991), is congruent with the definition of a watershed rule, *Sullivan* directs that any new rule extending the reasonable doubt standard falls within the *Teague* exception. See *Tyler v. Cain,* 533 U.S. at 671-74 (Breyer, J., dissenting) (identifying congruence); *id.* at 666-67 & n.7 (opinion of the Court).

The circuit court decisions holding *Booker* not to be retroactive are at odds with the reasonable doubt standard's place at the "foundation of the administration of our criminal law," *Winship,* 397 U.S. at 363. The courts have not recognized the watershed character of *Booker* 's requirement that facts exposing a defendant to enhancement under the mandatory Guidelines had to be proved beyond a reasonable doubt, *see Cunningham,* 127 S. Ct. at 863-64.

Several courts have failed to distinguish between *Booker* 's requirement of proof beyond a reasonable doubt and its separate requirement that sentence-enhancing facts be found by a jury. These courts have then erroneously treated *Schriro v. Summerlin,* 542 U.S. 348 (2004), as controlling. *See Humphress v. United States,* 398 F.3d 855, 863 (6th Cir.), *cert. denied*, 546 U.S. 885 (2005); *United States v. Cruz,* 423 F.3d 1119, 1120-21 (9th Cir. 2005), *cert. denied*, 546 U.S. 1155 (2006); *Varela v. United States,* 400 F.3d 864, 867-68 (11th Cir.), *cert. denied*, 546 U.S. 924 (2005). In *Summerlin*, however, this Court had no occasion to consider the reasonable doubt standard extended in *Booker* , because the case addressed a state capital sentencing scheme that had always required sentencing facts to be proved beyond a reasonable

doubt. *Id.* at 353 (noting that rule sought to be given retroactive effect, announced in *Ring v. Arizona,* 536 U.S. 584 (2002), "rested entirely on the Sixth Amendment's jury-trial guarantee"). While the same jury trial right was also one aspect of *Booker* 's holding, the Guidelines differed from the scheme considered in *Summerlin* in that the Guidelines provided for mandatory enhancement on the basis of facts proved by a simple preponderance rather than beyond a reasonable doubt.

In addition, the circuit decisions conflict with the precedent of this Court, which has held that the Due Process Clause requires proof beyond a reasonable doubt of facts essential "not only [to] guilt or innocence ... but also [to] the degree of criminal culpability." *Mullaney v. Wilbur,* 421 U.S. 684, 697-98 (1975). The *Summerlin* decision confirms the error of this line of analysis. *See Lloyd v. United States,* 407 F.3d 608, 614-15 (3d Cir.), *cert. denied*, 546 U.S. 916 (2005) (explaining why "*Summerlin* leaves little doubt that the 'watershed rule' exception can apply to a procedural rule that only affects sentencing").

Most relevant to Petitioner claim erroneously treatment of the question of *Booker* retroactivity exclusively by reference to the *remedy* by which *Booker* preserved an advisory Guidelines regime. They fail to acknowledge the existence of a distinct issue as to the proper scope to be given Booker's *rule* extending the reasonable doubt standard.

Petitioner's assertion, made first as an *Apprendi* issue

on appeal and then again under *Blakely* and again under *Booker*, is that he was punished in violation of the rule that sentence may not be enhanced upon facts never tested against the reasonable doubt standard. It is this proscription which, if "made retroactive," renders Fiorillo's petition timely under 28 U.S.C. § 2255 para. 6(3). *Booker* 's salvage of a substantial part of the Guidelines going forward did not cure constitutional errors that had already occurred. The Ninth Circuit's failure to acknowledge this distinction calls to mind this Court's recent exhortation that "*Booker* 's remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless." *Cunningham*, 127 S. Ct. at 870;*see also id.* at 869-70 & n.15 (holding that state sentencing regime under which statutory enhancement requires judge to find facts by simple preponderance violates rule of *Booker*, even when decision to enhance is discretionary).

II

THE *TEAGUE* RULE ON RETROACTIVITY SHOULD NOT BAR RELIEF WHERE THE VERY ISSUE BEING CONTESTED IN LIGHT OF NEW CONSTITUTIONAL LAW WAS DULY RAISED ON APPEAL

Teague holds that unless the claim falls into one of two narrow exceptions, a petitioner is barred from raising a claim for the first time in collateral proceedings unless he can show cause for the default and prejudice resulting therefrom. *Compare United States v. Haynesworth*, 34

Fed.Appx. 133 (4th Cir. 2002)(claims based directly on *Apprendi* may not be raised for the first time in a §§ 2255 motion. Where the claims have not been preserved at trial or on appeal, they are procedurally defaulted) with *Campbell v. United States*, 364 F.3d 727 (6th Cir 2004)(by timely objecting on direct appeal to the drug quantities, *Apprendi* claim is preserved for §§2255).

Fiorillo's sentencing claim raised first as a *Blakely* claim in the amended petition is not *Teague* barred because on appeal he specifically challenged his sentence on the grounds that the drug quantities had not been submitted to a jury and found beyond a reasonable doubt. Therefore, the Ninth Circuit's holdings in *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002)and *Cook v. United States*, 2004 WL 2365221 (9th Cir. 2004) that neither *Apprendi* nor *Blakely* apply retroactively to petitions for post conviction relief do not fall within the rule of retroactivity set forth in in *Teague v. Lane*, 489 U.S. 288, 229, 109 S.Ct. 1060, 1068 (1989).

Teague and its progeny regarding the retroactivity of new rules of constitutional law do not overrule the fundamental principle set forth by this Court in in *Davis v. United States*, 417 U.S. 333, 94 S.Ct. 2298 (1974) that a claim, which has been raised on direct appeal, involving an intervening change in the controlling law is cognizable in a §2255 motion. *Davis*, 417 U.S. at 342. Fiorillo's *Blakely* claim as to the drug quantities fits squarely within the holdings of *Davis* and therefore should be cognizable

when reasserted in his §2255 petition.

CONCLUSION

For the foregoing reasons this Court should grant the petition for certiorari.

Respectfully,

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